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Consultation response

Article 102 Guidelines

American Chamber of Commerce to the European Union
Speaking for American business in Europe

Avenue des Arts/Kunstlaan 56, 1000 Brussels, Belgium • **T** +32 2 513 68 92
info@amchameu.eu • amchameu.eu • European Transparency Register: 5265780509-97

Executive Summary

The proposed Article 102 Guidelines aim to provide much-needed clarity on the enforcement of EU competition rules, particularly concerning exclusionary abuses of dominance. However, the current draft raises significant concerns that undermine its stated objectives. Notably, the Guidelines depart from established case law and the effects-based approach of present for a more formalistic framework that shifts enforcement discretion heavily towards the Commission. This approach risks increasing legal uncertainty, complicating businesses' ability to self-assess conduct, and inadvertently penalising pro-competitive behaviour. Furthermore, the draft's lack of specificity—especially in areas such as market dominance thresholds, aftermarkets, and the treatment of loyalty rebates—could exacerbate regulatory unpredictability and deter investment across sectors.

In their current form, the Guidelines pose challenges to both European competitiveness and legal certainty. To address these issues, the Commission should revise the Guidelines to align with recent developments in case law, maintain an effects-based economic approach, provide clarity on conduct not subject to specific legal tests and objective justifications and ensure that the new enforcement approach does not lead to discrimination. A balanced revision will ensure effective antitrust enforcement while fostering innovation, investment, and growth in the EU's increasingly dynamic economic landscape.

Introduction

Exclusionary abuses of dominance have remained one of the few areas of European competition law without guidelines that clarify the application of the rules of the Treaty on the Functioning of the European Union (TFEU). The guidance on the application of Article 102 TFEU to exclusionary abuses (the Guidelines) seeks to increase predictability and offer direction to Member States. However, the draft text gives overreaching discretion to the Commission in the enforcement of Article 102 TFEU to the detriment of predictability and legal certainty.

As addressed in more detail below, these draft guidelines: appear to depart from the traditional case law on the application of Article 102 TFEU and from the effects-based approach of the 2008 Guidance on the Commission's enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings[1] (Guidance Paper), which was recently confirmed by the EU courts, in favour of a more formalistic approach; abandon many of the safe harbours that the Guidance Paper offers and increase the discretion of the Commission; lack specificity and sufficient clarity to help businesses meaningfully assess their conduct; and create risks of discrimination against non-EU companies.

These concerns reduce the coherence, clarity and predictability of the proposed enforcement policy and highlight the ongoing debate about how best to balance effective enforcement of competition law, the need for legal certainty and a degree of flexibility.

In this regard, the Draghi Report addresses several key aspects of European competitiveness and predictability. On one hand, it emphasises the need for a balanced approach to competition within the EU. On the other, it stresses the importance of creating a predictable regulatory environment to ensure businesses can plan and invest with confidence. However, the current draft of the Guidelines

[1] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01)

proposes concerning departures from the Commission's enforcement approach over the past 20 years, thus creating significant uncertainty for companies. This would affect all sectors of the economy and all business models.

The ultimate legality of such a new discretionary approach would also be subject to significant delay while awaiting judicial review at the EU level. Furthermore, these concerns could potentially spread to enforcement authorities other than the European Commission, as national competition authorities may take inspiration from or cite the Guidelines.

More broadly, the draft Guidelines lack specificity in many areas, which would make it hard for companies to self-assess their conduct. Moreover, the Guidelines fail to incorporate or elaborate on the case law clarifying what type of conduct does *not* constitute a violation of Article 102 TFEU. It would be helpful if the Commission could follow the approach taken in its Horizontal Guidelines and provide real-life examples together with an explanation of how the Commission expects to assess such cases.

The Guidelines depart from the soft safe harbour on dominance

On dominance, the Guidance Paper indicated that market shares were only a 'useful first indication' of the relative importance of the undertakings on the market and that companies with low market shares – below 40% – were unlikely to be dominant. The draft Guidelines take a different tone: 'the existence of very large market shares […] are in themselves – save in exceptional circumstances – evidence of the existence of a dominant position. This is the case in particular where an undertaking holds a market share of 50% or above' (paragraph 26, footnotes omitted). The soft safe harbour has been reduced from 40% to 10% and dropped to a footnote (41): '…Market shares below 10% exclude the existence of a dominant market position save in exceptional circumstances…' The draft Guidelines therefore eliminate the most basic safe harbour: that there can be no dominant position below a certain market share.

The Commission has concluded a number of Article 102 TFEU cases since the Guidance Paper and as far as is known, has not found dominance at market shares below 50%. In fact, market shares were well above 70% in most cases. Moreover, a potential (but not absolute) 10% market share safe harbour would be essentially meaningless in light of the provisions of the De Minimis Notice. Therefore, the Commission should reinstate in the draft Guidelines the Guidance Paper's approach and reintroduce the soft safe harbour indicating that market shares below 40% are not indicative of a dominant position.

The draft Guidelines should also provide more clarity on assessing dominance in aftermarkets:

- Section 2.2 on Single Dominance makes only a passing reference to aftermarkets in footnote 37 by referring to *European Federation of Ink and Ink Manufacturers (EFIM) v Commission*. Further information about the application of the EFIM test (formerly, the Pelikan-Kyocera test) could provide clarity on dominance in aftermarkets. The Commission should consider adding a separate section explaining the EFIM test. This could be done through referencing further caselaw that follows the EFIM test to assess the existence of dominance, such as the *Luxury Watches* cases. Alternatively, the Commission should consider adding more details to footnote 37.

- Similarly, economic literature does not support the assertion made in footnote 209 in section 4.2.2 on tying and bundling: that in order for a dominant position to be abusive, the undertaking must be dominant in the aftermarket of a tied product. Economists like Jorge Padilla indicate that in the case of aftermarkets, only an undertaking's dominance in the tying product is relevant – while 'the usual principles should apply' in aftermarkets[2] Padilla refers to the position set out by the Organisation for Economic Co-operation and Development in paragraphs 72 and 73 of its *Competition Issues in Aftermarkets, Background Note by the Secretariat* of 21-23 June 2017, where it states that '…prerequisites for establishing an illegal tying would be similar to other tying cases that do not involve an aftermarket' and that an unlawful tying arrangement in aftermarkets would include several elements, including 'proof that the seller had market power in the tying product, or in the case of aftermarkets, in the market for the primary product.'[3]

The Guidelines depart from positive elements of the current framework

The Guidelines appear to reconsider the Commission's traditional effects-based approach to abuse cases, which was referenced by the Guidance Paper and has been confirmed in several rulings of the EU General Court and Court of Justice of the European Union (CJEU) in favour of a formalistic approach.

Departing from these aspects of today's EU antitrust regime gives companies fewer tools to justify their legitimate conduct on the basis of beneficial outcomes and increases the risk of false positives, which would limit companies' ability to innovate and grow in Europe.

Effects-based approach

The Guidelines seem to move away from an effects-based approach, in particular by shifting onto companies the burden of proof required to establish an exclusionary abuse regarding certain types of conducts.

The Commission introduces three categories of conduct:

- The first category describes conduct that the Commission must prove capable of producing exclusionary effects, by providing sufficient evidence that the conduct increases the likelihood of such effects arising on the market.
- Conduct from the other two categories is first deemed to fall outside the scope of so-called competition on the merits (see paragraphs 47 and 53 for conduct fulfilling the requirements of a specific legal test and paragraph 54 for the 'naked restrictions') and second, is presumed to be capable of producing exclusionary effects. In only one of these categories is the presumption (ie conduct fulfilling the requirements of a specific legal test). In practice, the onus is on the dominant company, which must provide evidence to support the assertion that its conduct is not capable of having exclusionary effects. However, the Commission does not provide meaningful guidelines on what evidence is deemed sufficient in this regard.

[2] Jorge Padilla, *The Law and Economics of Article 102 TFEU*. See Chapter 11, section 11.4 (Tying in Aftermarkets).

[3] https://one.oecd.org/document/DAF/COMP(2017)2/en/pdf

> In addition, the draft Guidelines stress the strong probative value of the presumption, since it reflects 'the fact that the conduct at stake has a high potential to produce exclusionary effects' (see paragraph 60 (b)). The Commission may prove its case by simply 'show[ing] that the arguments and supporting evidence submitted by the dominant undertaking are insufficient to call into question the presumption' (see paragraph 60 (b) (i)). As for 'naked restrictions', rebuttal is virtually impossible.

Despite the Commission's statements to the opposite, this represents a return to a formalistic approach. The Commission, in effect, discharges itself from the burden of demonstrating the effects of a large set of foreclosure abuses.

However, such an approach is at odds with part of the EU caselaw, as can be seen from the most recent case dealing with loyalty rebates falling within the 'conducts fulfilling the requirements of a specific legal test' category (*Intel C-240/22* P of 24 October 2024 – ***Intel II***). In *Intel II*, the CJEU seems to confirm that the onus is on the Commission to demonstrate the conduct's capability of producing exclusionary effects.

Admittedly, regarding the grant of loyalty rebates, the *Intel* case (C-413/14 P of 6 September 2017 – ***Intel I***) makes clear that the dominant company must submit, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of producing foreclosure effects. However, this does not imply a presumption of illegality that the dominant company must dispel. At no time does the CJEU refer to a presumption of illegality. The dominant company must only submit that its conduct was not capable of producing foreclosure effects and adduce supporting evidence. It must not demonstrate beyond reasonable doubt that the conduct is lawful. Rather, the burden of proof is on the Commission to demonstrate both that the conduct is not competition on the merits and that the conduct is capable of restricting competition. To do that 'the Commission is required to analyse [a number of] factors' (see paragraph 180).

Further, the *Intel II* case makes clear that 'the demonstration that conduct has the actual or potential effect of restricting competition…must be made, **in all cases**, in the light of all the relevant factual circumstances' (paragraph 179, emphasis added). It goes on to add that '[t]hat demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects' (paragraph 179). In other words, the burden of proof falls on the Commission 'in all cases'. That includes the so-called naked restrictions. And in all cases, the Commission must take into account all the relevant factual circumstances.

The Court's approach is sound since it is well established that certain conduct that may be considered *prima facie* as harmful might be reconsidered with a thorough effects-based analysis. The Guidelines' approach is also inconsistent with other settled case law that has been receptive to the principles laid down in the Guidance Paper.

Therefore, committing to an effects-based approach in the Guidelines would be in line with the recent rulings of the EU Courts in the domain of exclusionary abuses. An effects-based approach would ensure that the Commission only targets conduct that is genuinely capable of harming competition. This approach would avoid penalising pro-competitive behaviour, provide clearer guidance for businesses and focus investigations on the actual or potential impact of a company's conduct on competition, rather than simply categorising certain behaviours as inherently illegal.

The need for an effects-based approach is further reinforced in the current economy, characterised by markets that are increasingly complex and fast moving. While the Commission's desire to be able to more rapidly enforce against abusive conduct is understandable, relying on *per se* or quasi-*per se* rules, based on cases that may no longer be related to today's market dynamics, opens the door to dangerous over enforcement. Likewise, reliance on such rules does not leave room for assessments of conduct in a specific market and the prevailing circumstances at the time, unless there is a rebuttal by the party under investigation.

As-efficient competitor (AEC) principle and test

The ACE principle was introduced in the Guidance Paper to signify that with respect to pricing abuses, the Commission would normally only intervene if a given conduct was capable of foreclosing as-efficient competitors.

This principle has been confirmed in recent case law from the EU Courts as a general requirement for the application of Article 102 TFEU to exclusionary abuses.

In *European Superleague Company*, EU Courts stated that 'it is **not** the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, a dominant position on a market, or **to ensure that competitors less efficient than an undertaking in such a position should remain on the market**' (*European Superleague Company*, C-333/21, paragraph 126, emphasis added). In other words, 'abuse of a dominant position could be established, inter alia, where the conduct complained of produced exclusionary effects in respect of competitors **that were as efficient as the perpetrator** of that conduct in terms of cost structure, capacity to innovate, quality' (*Google AdSense*, Case T-334/19, paragraph 106, emphasis added).

The CJEU has also confirmed this approach in *Intel II*. It states in general terms that 'in order to find…that conduct must be categorized as "abuse of a dominant position", it is necessary, as a rule, to demonstrate…that that conduct has the actual or potential effect of restricting that competition **by excluding equally efficient competing undertakings** from the market or markets concerned or by hindering their growth on those markets' (paragraph 176, emphasis added). It goes on to say that 'Article 102 TFEU prohibits…from engaging in practices…which have an exclusionary effect **on competitors considered to be as efficient as the dominant undertaking** itself' (paragraph 177 emphasis added). It is clear that, in general, the illegality of a conduct hinges on whether 'as efficient competitors', not 'less efficient competitors', may be excluded from the market.

The Guidelines, departing from the Guidance Paper (including as amended in the Amending Communication of 27 March 2023), do not take sufficient account of this principle, which should inform the Commission's overall enforcement actions regarding exclusionary abuses. The Commission should clarify how it intends to give effect to the above case law in its enforcement activity.

Furthermore, the Guidelines inexplicably limit the use of the AEC test. Such a test represents the key analytical framework to establish pricing abuses under the Guidance Paper. In *Intel II*, the CJEU held that the capability of loyalty rebates to foreclose an as-efficient competitor 'must be assessed, as a general rule, using the AEC test' (paragraph 181). Although the CJEU recognises that there are other methods to make the assessment, it stresses that the AEC test is specifically suited for purpose. Moreover, the CJEU recently emphasised the relevance of the AEC test for non-pricing conduct too

(eg *Unilever Italia Mkt. Operations*, C-680/20, paragraph 59). Conversely, the proposed text of the Guidelines expressly refers to the use of the AEC test only when assessing a margin squeeze.

The Commission should update the draft Guidelines to reflect the most recent case law and provide more guidance on all situations where the AEC test would remain relevant.

Companies need legal certainty to plan and operate their businesses. It is therefore of paramount importance that liability for pricing conduct not be based on the costs of a less efficient rival or a hypothetical entity that the dominant company does not control or even know about. Further, the AEC test helps ensure that companies can compete on merit in a framework that does not protect less efficient competitors.

The Guidelines adopt a formalistic, legal approach instead of an economic approach

The departures from existing antitrust enforcement described above, along with the adoption of new categories of conduct with presumptions of foreclosure effects, essentially adopt a legalistic approach to antitrust that requires companies to adhere to predetermined rules and categories of conduct regardless of a specific conduct's actual effects. This is a significant change from the current economic, effects-based approach, which gives companies more opportunities to operate and compete on merit, with antitrust proceedings focusing on the real adverse economic effects of certain conduct.

The result of such a formalistic approach is evident when the Commission's decisions ignore the reality of the market and break the cardinal rule of competition law enforcement by protecting the position of competitors and not the competitive process. Equating the protection of competitors with the protection of consumer welfare is a significant departure from how Article 102 TFEU has been conceived of, interpreted and enforced. In turn, this trend may undermine companies' incentives to invest and innovate to improve their services for EU consumers.

This discourages companies from innovating and ultimately hurts the EU. Companies would hesitate to bring innovative products and services to the EU out of fear that they would pre-emptively be deemed an abuse of dominance in absence of any evidence of foreclosure or competitive harm or worse, on the basis of mere hypotheses of what may come to pass. This formalistic approach extends to the standard for determining dominance based on market share, with a quasi-presumption that more than 50% of market share would be sufficient to establish dominance with few exceptions.

The existing economic approach is vital to ensuring that enforcement actions are based on real evidence and reflect the realities of a specific case. This allows companies to innovate and compete on their merits, while ensuring anticompetitive actions are punished proportionately. A formalistic approach to antitrust would unduly limit the behaviour of dominant companies by restricting certain conduct regardless of the actual economic benefits, positive or negative. This would stunt growth in sectors where innovation is key and be detrimental to Europe's competitiveness.

Likewise, any formalistic, legal approach to antitrust would quickly become irrelevant. This approach would limit the Commission's ability to keep up with the rapidly evolving nature of markets, particularly in fast-moving industries where the EU prioritises competitiveness.

The Guidelines create additional areas of uncertainty

Although the draft Guidelines are supposed to provide clarity to businesses, the current proposal falls short in various respects.

Available objective justifications

The section dealing with objective justifications is significantly lighter than the rest of the proposal. This is worrisome because the draft Guidelines presume several types of conduct are anticompetitive, reversing the burden of proof entirely. It would be helpful if the Commission were to provide more guidance on objective justifications, especially in light of the stricter approach to some forms of conduct.

- **Objective necessity defence**: it would be helpful for the Commission to provide more concrete guidance on the types of 'objective necessity' evidence that could be persuasive. For instance, merely referring to technical justifications linked to maintaining or improving the performance of a product is circular and does not help companies understand what threshold is applicable. Similarly, it is unclear from the draft Guidelines how an undertaking would be able to rely on 'other public interests' in practice.

- **Efficiency defence:** it would be helpful for the Commission to provide more concrete guidance on the types of efficiencies that it is likely to consider, as well as indications on how it would balance efficiencies and alleged exclusionary effects, especially when dealing with non-price conducts.

More broadly, the Guidelines require undertakings to provide a 'cogent and consistent body of evidence' but lack detail as to what would constitute such acceptable evidence.

Conduct with no specific legal test

While the Commission's effort to provide guidance for types of conduct that are not currently subject to any specific legal test is laudable, the approach taken in Section 4.3 raises concerns. It is unclear how and why the Commission has selected particular types of conduct for inclusion in the Guidelines and omitted others.

More specifically:

- **Self-preferencing:** the Guidelines introduce various reference to consumer behaviour and choice but do not provide any clarity on the types of evidence the Commission is likely to use to demonstrate preferential treatment – eg when implemented by 'manipulating consumer behaviour and choice' – nor how such abuses would interact with enforcement of the General Data Protection Regulation (GDPR).
- **Access restrictions**: while the section on access restrictions tries to summarise the Commission's approach based on past cases, these dealt with complex situations where findings were only reached after detailed assessments of the relevant conduct and their context. Indeed, in those cases that were settled by commitments, no formal finding on dominance was made at all. Trying to abstract the reasoning of such cases into high-level principles risks significantly broadening the notion of abuse. While the Guidelines cannot

account for each and every situation, they should make clear that assessing access restrictions warrants a careful and nuanced approach in any case.

Moreover, the different types of access restrictions briefly set out in Section 4.3.4 would not allow companies to appropriately assess whether their conduct is at risk of being found abusive. Absent more clarity and definition, this may give the Commission too much discretion, contributing to a more uncertain business environment.

This is, for instance, the case of the reference to failure to comply with a regulatory obligation in point 166 (b), where there is no guidance on: the type of regulatory obligation that would be covered – and in particular how this would fit with key regulations like the Digital Markets Act or GDPR; or how the Commission would cooperate with relevant regulators. Similarly, paragraph 166 (c) tries to reduce complex cases to two simple sentences, missing some of the nuance needed when dealing with unfair access conditions.

Finally, with regards to 166 (d), the current draft is too broad to provide clear guidance. For instance there is no explanation on: how the Commission would assess the 'declared purpose' of the input shared (ie what level of commitment to openness is needed to trigger this); how this provision would apply in case of new versions of products; and what the threshold would be for the restriction of access to be abusive.

Additional guidance would be helpful. While the draft Guidelines refer to data-driven advantages as a type of barrier to entry, it could be useful to provide more guidelines on data-related conduct, considering the significance of data for the digital economy. The Commission could also consider expanding the guidelines to cover exploitative abuses as well as exclusionary ones.

Rather than helping companies self-assess their conduct in these areas, the current proposal risks capturing many legitimate situations and deterring companies from implementing certain pro-competitive activities.

Companies especially need concrete examples for any type of conduct not subject to any legal test that the Commission includes in the Guidelines.

Conduct with specific legal tests

Loyalty rebates

The Guidelines include loyalty rebates (ie granting rebates conditional on the customer/supplier purchasing/selling all or most of its requirements/inputs from/to the dominant undertaking) within the wider category of 'exclusive dealing', which is a conduct that the Guidelines consider subject to a specific legal test. Paragraph 47 of the Guidelines states that when a given conduct meets the conditions set out in a specific legal test (eg in case of a loyalty rebate), it is deemed simultaneously to fall outside the scope of competition on the merits and to be capable of having exclusionary effects. Hence, it amalgamates the two steps. Further, Section 4.2.1 of the Guidelines, dealing specifically with 'exclusive dealing', refers only to the assessment of whether the conduct is capable of having exclusionary effects. There is no assessment of whether the conduct constitutes competition on the

merits. Hence, it assumes that the mere fact that the conduct constitutes 'exclusive dealing' renders the conduct competition other than on the merits. Moreover, Guidelines paragraph 82 states that 'exclusive dealing is presumed to be capable of having exclusionary effects'.

However, in *Intel II* , which deals with loyalty rebates, the CJEU refers to both competition on the merits and capability to foreclose as two different steps (see paragraphs 176 and 177). Further, the Court made a clear and very helpful distinction between them. On the one hand, paragraph 181 refers to the AEC test as a test which 'seeks specifically to assess whether such an as-efficient competitor...is capable of reproducing the conduct of the undertaking in a dominant position and, consequently, whether that conduct must be considered...competition on the merits'. On the other hand, paragraph 179 states that 'the demonstration that conduct has the actual or potential effect of restricting competition...must be made...in the light of all the relevant factual circumstances...That demonstration must, moreover, be aimed at establishing, on the basis of specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects'. In light of *Intel II,* when a loyalty rebate passes an AEC test with flying colours, the rebate is considered to be within the scope of competition on the merits and therefore fine. If it fails the test, then an assessment of all the relevant factual circumstances must be carried out to determine whether the loyalty rebate is capable of producing exclusionary effects. Hence, the Guidelines diverge significantly from the caselaw.

As a final point, the Guidelines indicate that the possible existence of a strategy aimed at excluding actual or potential competitors is not legally required to establish whether the exclusive dealing is capable of producing exclusionary effects (paragraph 83 (d)). However, the *Intel II* case states that 'the Commission is under a specific obligation to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as that undertaking from the market' (paragraph 130).

The Guidelines should provide more clarity on the resiliency test to prevent discrimination

The Guidelines introduce various references to resiliency, without providing any definition of such a notion. This approach raises concerns about how it would be applied in practice and could lead to the discriminatory treatment of non-EU companies.

First, footnote 4 defines the term 'quality' in an expansive way, including a reference to the notion of the 'resilience of supply chain'. Moreover, the draft Guidelines note that it would be possible to rely on the conduct contribution to the EU's resiliency as an objective necessity. The inclusion of such references does not appear warranted.

While it is not for a dominant undertaking to 'eliminate products which, rightly or wrongly, it regards as dangerous or inferior to its products', as the Commission puts it (point 168 of the Guidelines), it is also not for the Commission, when enforcing competition law, to eliminate products which, rightly or wrongly, it regards as dangerous to EU resilience. It should consider other non-antitrust tools if there is genuine concern about resilience.

The Commission should reconsider this point and at the very least, provide more guidance on what it plans to consider as part of this notion of resilience and reiterate its commitment to a non-discriminatory application of Article 102 TFEU.

Conclusion

While the adoption of the Guidelines is a step in the right direction, the current proposal goes far beyond the initial scope proposed by the Commission and would amount to a sea change in EU antitrust enforcement and business operations. These changes would significantly restrict companies' ability to justify their behaviour and discourage positive competition across sectors.

This would increase uncertainty and compliance costs for businesses operating in Europe and discourage companies from investing in or deepening their operations in Europe, particularly in sensitive sectors. In a moment when EU lawmakers, national governments and companies are simultaneously calling for a competitiveness agenda, these draft Guidelines would impose counterproductive structural impediments to doing business in Europe.

The Commission should revisit the draft to: align it with the most recent case law; reinforce its commitment to an effects-based economic approach; provide more guidance and clarity on conduct not subject to specific legal test and objective justifications; and ensure that the new enforcement approach does not lead to discrimination.